# INDEX



## CITATIONS





818205—49

# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 405

M. ROBERT GUGGENHEIM, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Claims (R. 22–27) is reported at 77 F. Supp. 186.

### JURISDICTION

The judgment of the Court of Claims was entered on April 5, 1948. (R. 27–28.) Petitioner's motion for new trial (R. 28) was filed June 4, 1948, and was denied (R. 28) on June 28, 1948. The petition for certiorari was filed November 9, 1948 under an extension order of this court dated September 22, 1948. (R. 40.) The jurisdiction of this court is invoked under 28 U. S. C. 1255.

### QUESTION PRESENTED

Whether, notwithstanding an agreement between the taxpayer and his representatives and the representatives of the Commissioner of Internal Revenue, finally settling and disposing of taxpayer's disputed tax matters for the years 1938 and 1939, taxpayer can maintain this action for recovery of alleged tax overpayments for those years.

### STATUTES INVOLVED

Internal Revenue Code:

> SEC. 23 [as amended by Sec. 121 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> (a) *Expenses.*—
>
> * * * * *
>
> (2) *Non-Trade or Non-Business Expenses.*—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.
>
> * * * * *
>
> (d) *Taxable Years to which Amendments Applicable.*—The amendments made by this section shall be applicable to taxable years beginning after December 31, 1938.

(e) *Retroactive Amendment to Prior Revenue Acts.*—For the purposes of the Revenue Act of 1938 or any prior revenue Act the amendments made to the Internal Revenue Code by this section shall be effective as if they were a part of such revenue Act on the date of its enactment. (26 U. S. C. 23.)

SEC. 3760. CLOSING AGREEMENTS.

(a) *Authorization.*—The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

(b) *Finality.*—If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection payment, abatement, refund, or credit made in accordance there-

with, shall not be annulled, modified, set aside, or disregarded. (26 U. S. C. 3760.)

SEC. 3761. COMPROMISES.

(a) *Authorization.*—The Commissioner with the approval of the Secretary or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense. (26 U. S. C. 3761.)

## STATEMENT

The facts relating to the single issue in the case may be summarized as follows:

Taxpayer duly filed his individual income tax returns for the calendar years 1938 and 1939, and paid the taxes thereon shown due. (R. 10, 11.) In the return for 1938, taxpayer claimed, among other deductions from income, the amount of $12,959.39 for hurricane loss to landscaped trees, $19,444.10 for insurance premiums paid, and $3,000 for legal fees paid, the last two amounts being claimed as business expenses in connection with taxpayer's interests in a trust estate. (R. 10.) In his return for 1939, taxpayer claimed, among other deductions from income, $4,555.62 for legal fees paid, as a business expense in con-

nection with his interests in a trust estate. (R. 10–11.)

Taxpayer was not engaged in any trade or business in 1938 and 1939. His income consisted almost entirely of distributions received from his father's estate and from two trust funds. (R. 16.)

After substantially all of the claimed deductions were denied by the Bureau of Internal Revenue, conferences were held between taxpayer's representatives and revenue agents and members of the Technical Staff of the Bureau, at which taxpayer's net income for 1938 was first increased to $74,379.87, but later decreased to $67,655.02. In the conference in respect of 1939, taxpayer's income was first increased to $93,909.68, and later decreased to $91,297.16. (R. 10, 11.) In his returns taxpayer had reported net income for 1938 of $40,509.41, and for 1939 of $87,245.93. (R. 10.)

The 1938 final computation resulted from taxpayer's concessions on other disputed items, and the Government's allowance of $8,000 of the claimed hurricane loss. The final figure for 1939 resulted from taxpayer's concession of the issue involving the attorney's fees, and the Government's change of position on the taxable percentage of the Kennecott Copper Corporation's dividends received by taxpayer in 1939. (R. 10, 11.)

Immediately following the final conference between taxpayer and his representatives and the

representatives of the Technical Staff, the head of the Atlantic Division of the Staff, under date of May 5, 1941, transmitted a letter to counsel for taxpayer advising of the acceptance of counsel's proposal for settlement of the tax matters in dispute, and of the consequent recomputation of taxpayer's tax liabilities for 1938 and 1939. With the letter a Form 870–T. S., showing the tax results agreed upon was transmitted, and notification was given that upon taxpayer's execution and return of the form to the Technical Staff, and the Commissioner's approval thereof, a copy of the completed agreement would be returned to taxpayer for his files. (R. 11.)

The printed Form 870–T. S., which was transmitted to taxpayer, was a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax," but it had been modified materially to set forth the agreement arrived at in respect of taxpayer's tax liabilities. First, it provided for acceptance and approval of the amounts of taxes agreed upon by or on behalf of the Commissioner of Internal Revenue, for use "as a basis for closing the case." Second, it provided that if such acceptance and approval was made by the Commissioner of Internal Revenue, "the case shall not be reopened nor shall any claim for refund be filed or prosecuted respecting the taxes for the year(s) above stated, in the absence of fraud, * * * or of an important mistake in mathematical calculations." Third, the printed pro-

vision allowing the Commissioner of Internal Revenue to assess further deficiencies should it subsequently be determined that additional taxes were due, was stricken from the form. (R. 11–13.)

On May 6, 1941, counsel for taxpayer returned the Form 870–T. S. to the Bureau of Internal Revenue, properly signed and dated by taxpayer. Counsel's letter expressed his appreciation, in advance, for putting the matter through to "final completion in as short a time as may be feasible in order to save the running of further interest." The form was formally accepted on behalf of the Commissioner of Internal Revenue on the same date, and on May 7, 1941, taxpayer was advised by letter that his proposal for settlement, incorporated in the form, had been accepted. Detailed computations of the deficiencies agreed upon for 1938 and 1939 were enclosed. (R. 13, 14.) The agreed deficiencies were assessed in May of 1941 and were paid with interest on June 2, 1941. (R. 14.)

Separate claims for refund were filed by taxpayer on November 19, 1942. The claims asserted that certain listed expense items which had previously been claimed in taxpayer's return, but had been the subject of controversy until the agreement of May 5, 1941, was reached, were allowable under the provisions of Section 121 of the Revenue Act of 1942. (R. 14–16.)

On November 12, 1943, the head of the Atlantic Division of the Technical Staff advised taxpayer by letter as follows (R. 15–16):

> In re: Years 1938 and 1939:
>
> Reference is made to claims for refund filed by you for the years 1938 and 1939. This action on your part is contrary to the provisions of agreement, Form 870–TS, executed by you in connection with the closure of the case, under which you bound yourself to take no action for recovery of any part of the taxes for said years.
>
> The closing effected in this case was made in a spirit of concilation and involved the making of concessions on the part of the Government which would not have been made under the situation as it now exists. This office has reexamined the file of the case and is of the opinion that were it not for the fact that the statute of limitations has run against the collection of a further deficiency, this office would be disposed to reopen the case since you are the initiating party. However, since the statute of limitations bars the collection of additional tax, this office concludes to stand by the agreement and insist upon compliance with its terms. * * *

Formal notice of disallowance was transmitted to taxpayer on December 29, 1943. Taxpayer instituted this suit below on December 28, 1945. (R. 16, 1.) The Court of Claims held that the taxpayer is not entitled to recover and that the petition should be dismissed. (R. 27.)

## ARGUMENT

1. The taxpayer and his representatives and the representatives of the Commissioner of Internal Revenue worked out a good-faith settlement of taxpayer's tax matters for 1938 and 1939, in May, 1941. Each side made substantial concessions to arrive at the agreed liabilities which were to serve "as a basis for closing the case". The minds of the parties met and the agreement was recorded in writing. The agreement was approved by the Commissioner of Internal Revenue, and the stated tax deficiencies were promptly paid. The case was closed accordingly. It was only after the enactment of the Revenue Act of 1942 that taxpayer undertook to repudiate the settlement.

The findings below leave no room for doubt that the conferees representing both sides were authorized to act as they did, and that all intended to make a final settlement and disposition of taxpayer's tax matters for the years involved; that a settlement was arrived at on a mutually satisfactory basis, and that the settlement was approved, adopted and carried out to the letter; that both parties bound themselves unequivocally not to undertake to reopen the matter in the absence of fraud or major mathematical error. No fraud or mathematical error has been alleged. The executed and approved Form 870–T. S., together with the correspondence currently exchanged, and taxpayer's prompt payment of the stipulated de-

ficiencies, clearly evidenced the agreement and its performance.

The Government agrees with the disposition made of this case by the Court of Claims, which in holding that the taxpayer was barred from maintaining this action, stated as follows (R. 26):

> At the time the agreement in this case was executed the statute had not run on the collection of further deficiencies, but when the claims for refund were filed the statute had run. It would obviously be inequitable to allow the plaintiff to renounce the agreement when the Commissioner cannot be placed in the same position he was when the agreement was executed. A clear case for the application of the doctrine of equitable estoppel exists and should be applied. Cf. *R. H. Stearns Co.* v. *United States,* 291 U. S. 54.

In the *Stearns* case, relied upon by the Court of Claims, Mr. Justice Cardozo's opinion for the Court rejected a contention similar to that made here (291 U. S. at 61–62):

> The applicable principle is fundamental and unquestioned. "He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says to him in effect 'this is your own act, and therefore you are not damnified.'" [Citations.] Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for

> little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. A suit may not be built on an omission induced by him who sues.

Accord: *Dickerson* v. *Colgrove,* 100 U. S. 578, 580–81; *Ralston Purina Co.* v. *United States,* 58 F. 2d 1065 (C. Cls.), certiorari denied, 289 U. S. 732; cf. *Botany Mills* v. *United States,* 278 U. S. 282 (where no ground for estoppel appeared in the record or was claimed).

2. *Joyce* v. *Gentsch,* 141 F. 2d 891 (C. C. A. 6), is typical of the cases on which petitioner relies to assert a conflict. In that case the Court of Appeals for the Sixth Circuit held that the Commissioner could not show an equitable estoppel because by the very terms of the so-called "settlement agreement" (an unmodified Form 870), the parties did not intend, as in this case, a final definitive settlement of the outstanding tax issues between them. The court said (p. 895):

> * * * by its very terms, an intention not to bind the Government to a final settlement was manifest. The right to assess a further deficiency was expressly reserved. The waiver agreement was, therefore, entirely lacking in essential mutuality.

The other cases relied upon are also distinguishable on their facts. In this case the printed

reservation of the right to assess other and further tax deficiencies was carefully stricken from the modified Form 870–T. S. which was used to evidence the agreement of the parties. See *Baldwin* v. *Higgins* (S. D. N. Y), decided June 23, 1937 (19 A. F. T. R. 1341), affirmed *per curiam,* 100 F. 2d 405 (C. C. A. 2). Cf. *Rubel Corp.* v. *Rasquin,* 43 F. Supp. 111 (E. D. N. Y.), affirmed, 132 F. 2d 640 (C. C. A. 2). Cf. *Bank of New York* (*Estate of Nichols*) v. *United States,* not yet reported, decided by the Court of Appeals for the Third Circuit on August 24, 1948, in which a somewhat different form was used to evidence the agreement between the parties.[1]

3. Taxpayer's asserted right to claim his non-business expenses as deductions from income in this case was created by legislation enacted after the settlement of May 7, 1941. That fact, however, is not material. In *Castell* v. *United States,* 98 F. 2d 88 (C. C. A. 2), certiorari denied, 305 U. S. 652, an alien's representative had signed a release to the Alien Property Custodian for all taxes paid by him during the period the alien's property had been under control of the custodian. Approximately two years later, the Settlement of

[1] The Government has been granted an extension of time to January 21, 1949, within which to apply for certiorari in that case. If the writ in the present case should be granted, the Government may seek review of the *Bank of New York* case in order that the Court may have a more comprehensive basis for review of the problem.

War Claims Act was enacted (March 10, 1928), under which a substantial part of the taxes paid by the Alien Property Custodian on the alien's income would have been recoverable except for the release previously executed. The court said (p. 91):

> It is argued finally that it is contrary to sound public policy to sanction a release by a citizen of future benefits extended by Congress for her relief. We see no sufficient ground for this contention since we can discover no public policy against retaining taxes at rates imposed before the remedial statutes were enacted in cases where the taxpayer has agreed, in return for a valuable consideration, not to take advantage of future tax exemptions. * * *

Cf. *Ross* v. *United States,* 75 F. Supp. 725 (C. Cls.).

Even a tax liability settled on the basis of a statute subsequently declared invalid may not be recovered. *Banker's Reserve Life Co.* v. *United States,* 44 F. 2d 1000 (C. Cls.), certiorari denied, 283 U. S. 836; *Wisconsin Nat. Life Ins. Co.* v. *United States,* 42 F. 2d 316 (C. Cls.). Cf. also *Hord* v. *United States,* 59 F. 2d 125 (C. Cls.).

## CONCLUSION

The decision below is correct, and there is no necessity for further review. The petition should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
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# Supreme Court of the United States

OCTOBER TERM, 1948.

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No. 405.

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M. ROBERT GUGGENHEIM, *Petitioner*,

v.

UNITED STATES OF AMERICA.

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**On Petition for Writ of Certiorari to the Court of Claims.**

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## PETITION FOR REHEARING

**Of Order of January 10, 1949, Denying Petition for Writ of Certiorari.**

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## PETITION FOR REHEARING

**Of Order of January 10, 1949, Denying Petition for Writ of Certiorari.**

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*To the Honorable the Supreme Court of the United States:*

The Petition of M. Robert Guggenheim respectfully represents to this Honorable Court that he should be granted a rehearing and a redetermination of the Court's Order, of January 10, 1949, denying his Petition for Writ of Certiorari, based on the grounds hereinafter stated, they being "other substantial grounds available to petitioner although

not previously presented", as referred to in the Court's amendment to its Rule 33, at page 50. Such grounds are:

1. The effect of the conflict, between the instant decision of the Court of Claims and the five Circuit Court decisions (Petition for Certiorari, pp. 7, 8) previously cited, is much more widespread in the field of tax law and its administration than we were able to impress upon the Court in our previous presentation. See discussion of Court of Claims' decision of *this case*—and other related or contradictory cases —in Harvard Law Review, vol. LXI, No. 8 (September, 1948) pp. 1465-1467.

2. The lower courts have not applied consistently this Court's decision and suggestions in *Botany Worsted Mills* v. *United States,* 278 U. S. 282, 289; and an analysis of the Law Review article referred to makes it quite evident that an early settlement of this conflict, on the application of estoppel to tax compromises, is just as important in the administrative affairs of the Government as was a determination, of the "validity of the patents" in the *Schriber-Schroth Co.* case, in the affairs of the automobile industry.

This Court, in *Schriber-Schroth Co.* v. *Cleveland Trust Co.,* 305 U. S. 47, 50, cited in Rule 33, amended, p. 50 (upon deciding that "a resulting conflict of decision was improbable because of the concentration of the automobile industry in the Sixth Circuit") granted certiorari, *on a petition for rehearing,* in view of "the doubtful validity of the patents" and "reversed and remanded" the case to the Circuit Court (p. 61). The importance of the "validity of the patents" involved in the *Schriber-Schroth* case no doubt was very great in the automobile industry; but it is believed obvious that, throughout the whole country, much greater confusion may be caused by not having declared, as soon as it reasonably may be done, a consistent rule as to when estoppel may or may not properly take tax compromise agreements outside the positive statutory requirement that they should have the approval of the Secretary of the Treasury or of one of his specified assistants.

The discussion of the instant case in the Harvard Law Review (after referring to the Supreme Court's having indicated that solution of this problem—the finality which both parties are seeking in real compromise agreements—through agreements effective from the time of signature "requires strict compliance with the statutory formalities"; and noting the Court's suggestion, in the *Botany Mills Co.* case, that an informal compromise "though not binding in itself, may when executed become, under some circumstances, binding on the parties by estoppel . . . .") states that *"The lower courts have not developed these suggestions with any consistency"* (Emphasis supplied) p. 1467; and proceeds to cite a number of cases.

(*Note 1:* Since we showed a positive conflict between (a) the Court of Claims' decision in the instant case and (b) this Court's decision in the *Botany Mills Co.* case, plus five Circuit Court decisions—in the absence of a proper application of the principle of estoppel—it would seem definitely pertinent (with the "conflict" element thus logically settled in petitioner's favor) to consider whether it is not more important, *or at least as important, in the public interest,* to clarify the confusion and inconsistency now existing, in this field of tax-compromise-waiver-agreement-estoppel situations, as it was to clarify the "doubtful validity of the patents" in the *Schriber-Schroth* case, where the "conflict of decision" element likewise was outside the Court's then immediate consideration because, there, it "was improbable" that such a conflict would arise owing to the concentration of the automobile industry, to which the patent exclusively applied, in one Circuit.)

(*Note 2:* That there was not a proper application of the principle of estoppel by the Court of Claims' decision in the instant case has been shown by analysis and citations of law heretofore, the chief point thereof —that the taxpayer herein did not "prevent" the making of any possible additional assessments against him since *he took no initiative* toward effecting the so-called compromise—having been summarized at pp. 2-5 of Petitioner's Reply Brief by nine (9) references to

places where the *Stearns* decision (*R. H. Stearns Co. v. United States*, 291 U. S. 54, 57-61) had specifically mentioned the initiative there taken by that taxpayer, wherefore he properly was estopped from later taking a different position. *And*, it was the *Stearns* case upon which the Court of Claims herein relied as presumed support for its erroneous view that estoppel should be applied to the instant situation.)

3. That the estoppel element, as applied to this field of the law, has not been well-defined nor consistently interpreted by the courts up to now, is forcefully demonstrated by the Law Review article mentioned, where it says (following the citation of cases which we previously mentioned): "And *the ill-defined doctrine of 'equitable estoppel' offers no better basis for deciding with certainty whether and when a given compromise has become binding upon the taxpayer.*" (Emphasis supplied) p. 1467.

(*Note:* There are two reasons why we now present the emphasizing, by the Law Review article, of the lack of "consistency", in the lower courts' applying of this Court's suggestions in the *Botany Mills* case, as grounds "not previously presented"; and why we did not heretofore "present" some reference to the Harvard Law Review's noticing of this case and the widespread problem which it involves.

(1. The mere fact that the Law Review was contemplating a review of this Court of Claims decision seemed hardly adequate to give as a reason why certiorari should be granted; although we did feel that it tended to show, in some degree, the "general importance" of the issue involved, even though its presentation as a reason at that time might have been a bit unorthodox. We had not received a copy of the article at the time of filing our Petition for Writ of Certiorari and Brief in Support, although copies of our Briefs in the Court of Claims previously had been requested by the editor; but we did have the article some time before filing Petitioner's Reply Brief, herein.

(2. The Law Review article makes a number of incorrect suggestions and statements, which we regretted

having to take the time of this Court to counteract, some of them being:

((a) The suggestion that the *Castell* case (*Castell* v. *United States*, 98 F. 2d 88) might have a bearing on the instant case because it presents a situation where an instrument was "binding as contract or by estoppel". The totally different situation which really was presented by that case is described in Petitioner's Reply Brief, pp. 14, 15.

((b) The statement, that the promissory estoppel doctrine "would seem a more satisfactory ground for reconciling" the Court of Claims' holding in the instant case "with the *Botany Worsted Mills* dictum", is not valid. Basic principles of law pertinent to the facts of the instant case; and also the elemental prerequisites of promissory estoppel prevent such a conclusion from being correct. It is established that a mere promise to do or not to do something in the future cannot work an estoppel unless the promisee has acted to his disadvantage in reliance thereon so that his status has been changed, and there is an element of actual or constructive fraud. *Harvey* v. *J. P. Morgan & Co.*, 2 N.Y.S. 2d 520, 166 Misc. 455. In its exposition of the doctrine of promissory estoppel, Corpus Juris Secundum says: "Of course, a promise cannot be the basis of an estoppel if any other essential element is lacking." 31 C. J. S. 291, Sec. 80. Justifiable reliance and irreparable detriment to the promisee are requisite factors to promissory estoppel. *Robert Gordon Inc.* v. *Ingersoll-Rand Co.*, 117 F. 2d 654.

((c) The statement is incorrect where the article says that, by refraining from additional assessment for 1938 until too late to take such action, "the Commissioner relied to his detriment upon the taxpayer's promise not to claim a refund * * * ". The facts of the instant case do not show that the Commissioner ever had any basis for, nor any real desire nor intent to, make any additional assessment whatsoever against this taxpayer for either of the years involved in the case. See Petitioner's Reply Brief, pp. 11, 12.)

(Regardless of the imperfection of some of its conclusions and the inadequacy of certain of its inferences,

the fact remains that this Harvard Law Review article shows a broad and diligent study of the subject by the man or men who prepared the review; and it should aid materially both in emphasizing the conflict resulting from the instant Court of Claims decision; and in demonstrating the inconsistency between the several courts in their past applications of "the ill-defined doctrine of 'equitable estoppel' " to tax compromises or alleged compromises.)

Wherefore, your petitioner respectfully prays that the above-requested rehearing be granted; that this Honorable Court redetermine its Order of January 10, 1949; and that the writ of certiorari now be granted as heretofore prayed.

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*Attorney for Petitioner.*

## CERTIFICATE OF COUNSEL.

As counsel for the petitioner in the foregoing Petition for Rehearing, I hereby certify that such Petition is presented in good faith and not for delay; and I further certify that the Petition is restricted to the grounds above specified.

Dated this 24th day of January, 1949.

ERRETT G. SMITH,
*Counsel for Petitioner.*